



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 26, 2000 appellant then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that in November 1999, he tore cartilage in his left knee while in the performance of his federal employment duties. He asserted that he was climbing a flight of stairs and felt a pinch and a "give way" sensation in his left knee while carrying his mailbag. On August 4, 2000 OWCP accepted appellant's claim for internal derangement of the left knee. Appellant underwent an arthroscopy of the left knee on May 22, 2000 with resection of medial synovial plica, partial synovectomy, and partial lateral meniscectomy. He underwent a second left knee arthroscopy on January 3, 2006 and a diagnostic arthroscopy of the left knee with a partial lateral meniscectomy and synovectomy on August 31, 2012.

The employing establishment offered and appellant accepted a series of limited-duty and full-time positions from April 10, 2006 through February 8, 2013. On February 8, 2013 it offered appellant a full-time modified city carrier position at the North Hollywood Post Office, which required 8 hours of sedentary work and 15 minutes of driving. The job duties were listed as processing priority parcels, weighing and rating postage due parcels in the Van Nuys Post Office from 9:45 a.m. until 3:30 p.m., and then driving to Sherman Oaks Post Office to clear carriers from 3:45 p.m. to 6:15 p.m. Appellant accepted this position on February 8, 2013.<sup>3</sup>

Beginning on November 26, 2013 appellant filed claims for compensation (Form CA-7) for intermittent LWOP commencing November 4, 2013. On the reverse side of the claim forms, appellant's supervisor indicated that modified work was available eight hours a day. She submitted an e-mail dated December 2, 2013, noting that there was eight hours of work available for appellant at the Van Nuys Post Office, but that he was afraid of the manager there and worked partial days at the Sherman Oaks Post Office.

In a development letters dated December 9 and 17, 2013, OWCP requested additional factual and medical evidence in support of appellant's claims for compensation. It noted that the employing establishment reported that eight hours of work was available and directed appellant to provide evidence as to why he had not performed the light-duty assignment offered. OWCP afforded appellant 30 days to respond. In statements dated July 20 and December 30, 2013, appellant noted his responses to the development letters, his understanding of the employment offered to him, and his disputes with the employment offered by the employing establishment.

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<sup>2</sup> Docket No. 15-1133 (issued December 21, 2015).

<sup>3</sup> Appellant filed a series of claims for compensation (Form CA-7) requesting compensation for intermittent leave without pay (LWOP) from July 27 through November 1, 2013. On the reverse side of the claim forms, his supervisor indicated that appellant was working modified duties and partial days. She noted that she was unable to identify enough available work within appellant's restrictions. Appellant completed time analysis forms (Form CA-7a) and indicated that no other work was offered by the supervisor at the Van Nuys Post Office. OWCP authorized compensation benefits from July 29 through November 1, 2013.

In a decision dated February 13, 2014, OWCP found that full-time light-duty work was available within appellant's restrictions and denied his claims for compensation for intermittent disability beginning November 4, 2013.

Appellant requested an oral hearing before an OWCP hearing representative on February 20, 2014.

In letters received by OWCP on March 6, 2014, the employing establishment noted that it was unable to identify enough available work within appellant's medical restrictions for him to complete a full day of work.<sup>4</sup>

The employing establishment offered appellant limited-duty assignments which he accepted on April 4 and June 16, 2014. Appellant returned to work as a full-time customer care agent, effective October 18, 2014.

On March 6, 2014 the employing establishment provided an e-mail dated July 19, 2013 from the manager at the Van Nuys Post Office in which he noted that he had instructed appellant to answer the telephones, that appellant protested, interrupted, would not listen, and gave excuses. He then told appellant to "clock out" as he was refusing to work. In an accompanying statement dated February 24, 2014, the employing establishment indicated that it did not offer appellant another written light-duty job assignment after February 8, 2013.

During the oral hearing held on September 10, 2014, appellant testified that he lost wages commencing November 4, 2013. Appellant's representative argued that the employing establishment's witness statements were inconsistent and that the employing establishment had not established that appellant refused work. He asserted that appellant had not refused a job offer, but that management told him to go home removing him from his limited-duty position.

By decision dated December 4, 2014, OWCP's hearing representative found that OWCP had met its burden of proof to deny appellant's claims for intermittent compensation for the period commencing November 4, 2013 and continuing.

On April 23, 2015 appellant appealed to the Board. In its December 21, 2015 decision, the Board found the case was not in posture for a decision and remanded for further development by OWCP as to whether there was full-time light-duty work available for appellant as of November 4, 2013, whether appellant received an appropriate light-duty position in writing, and whether the manager at the Van Nuys Post Office appropriately withdrew appellant's light-duty position for refusal to work.

Following the Board's December 21, 2015 decision, in a letter dated June 16, 2016, OWCP requested that the employing establishment describe appellant's work status on November 4, 2013, describe any periods of wage loss due to the employing establishment's inability to accommodate

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<sup>4</sup> The employing establishment completed appellant's Form CA-7s requesting wage-loss for the period January 27 through February 7, 2014 and February 10 through 21, 2014 by noting "unable to identify adequate work that is available within medical restrictions."

his light-duty restrictions, and to address whether the February 8, 2013 job offer was withdrawn in whole or in part. It afforded the employing establishment 14 days to respond.

In a letter dated June 30, 2016, the employing establishment asserted that on February 8, 2013 it provided appellant with an eight-hour job offer within his work restrictions. It alleged that that job offer remained available to appellant throughout November 2013 and that any wage-loss was not due to withdrawal of the job offer. The employing establishment asserted that there were intermittent periods in November 2013 when appellant chose not to work because of dissatisfaction with his working relationship with a manager. It provided appellant's light-duty job offers dated April 4, July 28, and September 8, 2014.

By decision dated October 18, 2016, OWCP denied appellant's claimed period of disability for the period November 4, 2013 through February 12, 2014. It found that a light-duty position was offered to appellant in writing and that he knew that this position was available.

On November 17, 2016 appellant requested an oral hearing from OWCP's Branch of Hearings and Review.

Appellant testified before an OWCP hearing representative on June 16, 2017. He reported on July 19, 2013 he was instructed by the manager not to return to the Van Nuys Post Office. Appellant testified that he returned to work at the Sherman Oaks Post Office from July 19 through December 2013. On August 22, 2013 he wrote a letter protesting the manager's behavior and asserting that he did not want to work at Van Nuys. However, appellant worked at Sherman Oaks Post Office while the Van Nuys manager conducted route inspections there for a week in September 2013. Appellant's supervisor at Sherman Oaks Post Office received notification that work was available for appellant at Van Nuys Post Office eight hours a day, but she asserted that appellant did not wish to work there. He asserted that the employing establishment instructed him that as his grievance was ongoing, he was not allowed to retract the statement in his August 22, 2013 letter that he did not want to work at Van Nuys Post Office, that he was not allowed to come back to work there even though work was available until the manager was transferred from Van Nuys Post Office in April 2014.

By decision dated July 27, 2017, OWCP's hearing representative found that the case was not in posture for a decision and remanded for OWCP to further develop the factual evidence from the employing establishment. She asked that the employing establishment provide documentation of grievances or disciplinary actions regarding the events of July 19, 2013, as well as an explanation of how the employing establishment determined that there were eight hours of work available for appellant from November 4 to January 27, 2014 when full-time light-duty work had not previously been available for appellant. The hearing representative further directed OWCP to obtain a statement from the manager of the Van Nuys Post Office addressing whether he instructed appellant not to come back to that facility.

In a letter dated August 2, 2017, OWCP requested that the employing establishment provide the documentation requested by OWCP's hearing representative. It afforded 30 days for a response.

On August 14, 2017 appellant provided additional factual evidence. On March 25, 2014 appellant's grievance regarding the events of July 19, 2013 was resolved without prejudice to either party. The dispute resolution team was unable to reach factual findings on the issues of whether the employing establishment refused to provide appellant with a PS Form 3917. The dispute resolution team was also unable to determine by a preponderance of the evidence that the Van Nuys manager treated appellant in an unprofessional manner with the exception of initially telling him to shut up, which he promptly corrected.

Appellant also provided an Equal Employment Opportunity (EEO) investigative affidavit from the Van Nuys manager dated February 28, 2014. He noted that he was the manager in July 2013 and that appellant had a direct supervisor. The manager further asserted that appellant was instructed to answer the telephone and that appellant refused to do so. He denied yelling at appellant or telling him to shut up. The manager responded to the question of whether he instructed appellant not to come back to the Van Nuys Post Office by answering, "Yes, since [appellant] refused to follow instructions, I informed [appellant] that there is no work available in main office, but he is still required to go [to Sherman Oaks Post Office]."

In a letter dated October 3, 2017, the employing establishment noted that appellant received a seven-day suspension for work incidents on July 19, 2013. However, on March 28, 2014 the employing establishment's dispute resolution team determined that management did not have just cause to issue a seven-day suspension to appellant on September 2, 2013 for failure to follow instructions on July 19, 2013 and rescinded the disciplinary action. The dispute resolution team found that management was aware of the alleged misconduct on July 19, 2013, but had not conducted an investigative interview for 31 days and did not formalize discipline for 46 days.

The employing establishment alleged that the eight-hour job offer issued on February 8, 2013 continued to be available to appellant on and after July 19, 2013. It provided an October 3, 2017 statement from the manager in which he alleged that on July 19, 2013 he asked appellant to sign a limited-duty offer answering telephones in the Van Nuys Post Office. The manager asserted that appellant refused to sign the job offer, refused to follow him into his office, and failed to acknowledge a direct order to come into his office. Appellant then left the building. He asserted that he was told that appellant refused to return to work at the Van Nuys Post Office.

An e-mail dated December 2, 2013, to appellant's supervisor, noted that work was available for appellant at Van Nuys Post Office for eight hours a day performing postage dues, however, appellant did not wish to work there because he was afraid of the manager.

In a letter dated November 28, 2017, OWCP again requested information from the employing establishment noting that appellant's claims for compensation indicated that appellant was working part time because there was no work available within his work restrictions. It asked, "Please specifically explain and provide documentation as to how the agency determined that there was eight hours of light duty available for the period November 4, 2013 through January 27, 2014 when there was no light duty available for the months prior to November 2013 as indicated on the CA-7s." OWCP afforded the employing establishment 15 days to respond.

The employing establishment responded on December 21, 2017 and asserted that there was eight hours of work available from November 4, 2013 through January 27, 2014 because this was

during the peak season of business. It noted that the December 2, 2013 e-mail confirmed the availability of eight hours of work at the Van Nuys Post Office, but that appellant declined this work. The employing establishment resubmitted documentation already of record.

By decision dated December 26, 2017, OWCP denied appellant's claims for wage-loss compensation for the period November 4, 2013 through February 12, 2014.

### **LEGAL PRECEDENT**

OWCP's implementing regulations define a "recurrence of disability" as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>5</sup> This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>6</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence, a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden of proof, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>7</sup> This burden of proof includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>8</sup>

### **ANALYSIS**

The Board finds that appellant has established a recurrence of intermittent disability from November 4, 2013 through February 12, 2014, causally related to his accepted November 1999 employment injury.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's December 4, 2014 decision because the Board has already considered this evidence in its December 21, 2015 decision. Findings made in

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<sup>5</sup> 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.a (June 2013). *See also J.C.*, Docket No. 17-0955 (issued October 23, 2017); *Philip L. Barnes*, 55 ECAB 426 (2004).

<sup>6</sup> *Id.* at § 10.5(x); *J.C.*, *id.*; *J.F.*, 58 ECAB 124 (2006).

<sup>7</sup> *J.C.*, *supra* note 5; *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>8</sup> *J.C.*, *supra* note 5; *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>9</sup>

The Board notes that appellant has not alleged a change in the nature and extent of his employment-related conditions. Instead he has alleged an inability to work as his light-duty assignment, made specifically to accommodate his physical limitations due to his or her work-related injury or illness, was withdrawn.

The Board finds that despite the employing establishment's assertions that appropriate light-duty work was available for appellant from November 1, 2013 through January 27, 2014, the record and specifically the statements provided by the Van Nuys manager contradict these assertions. The record is clear that as of July 19, 2013 appellant continued to work under the written requirements of the February 8, 2013 light-duty job, which required him to commute between the Sherman Oaks and Van Nuys Post Offices within his eight-hour workday. On July 19, 2013 there was a disagreement between the Van Nuys manager and appellant regarding the assignment of the duty of answering the telephone at that station.<sup>10</sup> In his March 6, 2016 e-mail and his February 28, 2014 EEO affidavit, the manager alleged that he instructed appellant to answer the telephone and that appellant refused to do so. In the e-mail, he reported that he had then instructed appellant to "clock out" as he was refusing to work. In his affidavit, the manager responded to the question of whether he instructed appellant not to come back to the Van Nuys Post Office by answering, "Yes, since [appellant] refused to follow instructions, I informed [appellant] that there is no work available in main office, but he is still required to go [to Sherman Oaks Post Office]." These statements support appellant's allegation that the Van Nuys manager directly informed him that there was no work for him at the Van Nuys Post Office, which effectively eliminated the February 8, 2013 light-duty job offer which, as noted previously, required appellant to work at both stations in order to complete an eight hour workday. The elimination of the Van Nuys Post Office portion of the February 8, 2013 light-duty position is further supported by the statements of appellant's supervisor on his claims for compensation from July through November 2013, and the resulting payment of wage-loss compensation to appellant. The Board finds that the weight of the evidence of record establishes that, on July 19, 2013, the employing establishment withdrew appellant's written light-duty job accepted on February 8, 2013.<sup>11</sup>

As the Board finds that as the employing establishment withdrew appellant's February 8, 2013 light-duty position, he is entitled to wage-loss compensation until he was offered a new written light-duty job offer, and has established a recurrence of disability for the period claimed. The employing establishment has repeatedly contended that the February 8, 2013 position

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<sup>9</sup> The medical evidence previously reviewed by the Board established that he continued to require work restrictions due to his accepted conditions. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. *See K.K.*, Docket No. 17-1061 (issued July 25, 2018). The Board will, therefore, not review the evidence addressed in the prior appeal.

<sup>10</sup> Appellant's grievance was resolved overturned the disciplinary action issued by the employing establishment against appellant, without attributing fault to the management.

<sup>11</sup> *F.K.*, Docket No. 11-0141 (issued September 7, 2011).

remained available,<sup>12</sup> but has not provided any evidence to contradict the manager's statement that he withdrew the work offered appellant at the Van Nuys Post Office or that it made any light-duty job offer to appellant in writing from July 21, 2013 until his return to work based on a written light-duty job offer on April 4, 2014.<sup>13</sup>

In the statement provided by the manager on October 3, 2017, he alleged that while appellant was at the Van Nuys Post Office on July 19, 2013 he asked appellant to sign a limited-duty offer answering telephones in the Van Nuys Post Office. There is no written copy of a July 19, 2013 job offer included in the record despite repeated requests of the Board, a representative of OWCP's Branch of Hearings and Review, and OWCP for all records pertaining to the events of July 19, 2013. OWCP's procedures require that offers of employment be made in writing or if made orally be provided in writing within two business days.<sup>14</sup> Neither the Board nor OWCP can evaluate a light-duty position offer unless the position is in writing. Therefore, this alleged offer of a new position cannot be found to constitute an appropriate light-duty assignment.<sup>15</sup> The employing establishment further asserted that there was work available for appellant beginning in November as this was the busy season and that appellant's supervisor was aware of work for appellant at the Van Nuys Post Office based on the December 2, 2013 e-mail. Appellant's supervisor submitted an e-mail dated December 2, 2013 noting that there was eight hours of work available for appellant at the Van Nuys Post Office, but that he was afraid of the manager there and only worked partial days at Sherman Oaks Post Office. The employing establishment again has not provided any documentation to support that it properly provided appellant with written notification or a job offer for this full-time position at Van Nuys Post Office during the period that it denied his requests for wage-loss compensation commencing November 4, 2013.<sup>16</sup>

The Board finds that appellant has established that the employing establishment withdrew his light-duty job assignment and that he is entitled to wage-loss compensation for intermittent disability from November 4, 2013 through February 12, 2014, causally related to his accepted November 1999 employment injury.

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<sup>12</sup> *F.K., id.; but see, G.C.*, Docket No. 14-1943 (issued May 4, 2015) *C.C.*, Docket No. 07-0483 (issued June 12, 2007) (the Board found that the employing establishment had not withdrawn the light-duty positions).

<sup>13</sup> *Id.*

<sup>14</sup> 20 C.F.R. § 10.505(a) (where the employer has specific alternative positions available ... the employer should advise the employee in writing...); 20 C.F.R. § 10.507(c) (the employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a)(1) (June 2013). If the [employing establishment] can provide alternative employment to a partially disabled employee ... it will make an offer of light duty to the claimant ... and provide a copy to OWCP."

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

**CONCLUSION**

The Board finds that appellant has met his burden of proof to establish a recurrence of intermittent total disability from November 4, 2013 through February 12, 2014, causally related to his accepted November 1999 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 26, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 7, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board